No. 96-981

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED FARMERS AGENTS ASSOCIATION, INC., et al.,
Petitioners,

vs.

FARMERS INSURANCE EXCHANGE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Properly framed, the question presented by the Petition is whether it was reversible error for the Court of Appeals to find that Respondents lacked market power in the market for insurance sales, where Petitioners admitted that Respondents lacked such power, and where Petitioners offered no evidence in support of a narrower relevant market.

PARTIES TO THE PROCEEDING

The Petitioners, appellants in the Court of Appeals, are United Farmers Agents Association, Inc., a California corporation, Thomas J. Vinson, individually and on behalf of a purported class, and Robert D. Moon, individually and on behalf of a purported class.

The Respondents, appellees in the Court of Appeals, are Farmers Insurance Exchange, a California reciprocal, or inter-insurance exchange, Fire Insurance Exchange, a California reciprocal or inter-insurance exchange, and Truck Insurance Exchange, a California reciprocal or inter-insurance exchange. As to the above Respondents, there are no parent or subsidiary companies.

Additional Respondents, appellees in the Court of Appeals, include Mid-Century Insurance Company, a California stock company, owned by Respondents Farmers Insurance Exchange, Fire Insurance Exchange, and Truck Insurance Exchange, and Farmers New World Life Insurance Company, a wholly-owned subsidiary of Farmers Group, Inc., a California corporation, a wholly-owned subsidiary of BATUS, a United Kingdom PLC.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

A. There Is No Conflict With Any Decision Of This Court. 5

B. There Is No Conflict With Any Decision Of Another Circuit. 8

C. This Case Is In Any Event An Inappropriate Vehicle For Review. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page(s)**

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 12

DeJesus v. Sears, Roebuck & Co., Inc.,
87 F.3d 65 (2nd Cir.), *cert. denied*, U.S. LEXIS
7180 (U.S. 1996) 10,11

Digital Equip. Corp. v. Uniq Digital Technologies, Inc.,
73 F.3d 756 (7th Cir. 1996) 6, 10

Eastman Kodak Co. v. Image Technical Servs., Inc.,
504 U.S. 451 (1992) 4,5, 6,7, 8,9,10, 11,12, 13,14

Jefferson Parish Hosp. Dist. No. 2 v. Hyde,
466 U.S. 2 (1984) 5, 6, 9,10,12

Lee v. Life Ins. Co. of North America,
23 F.3d 14 (1st Cir.), *cert. denied*, 115 S. Ct. 427
(1994) 9

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 12

Northern Pacific Ry. Co. v. United States,
356 U.S. 1 (1958) 5

United Farmers Agents Ass'n., Inc. v. Farmers Ins. Exch.,
892 F. Supp. 890 (W.D. Tex. 1995) 11

United Farmers Agents Ass'n., Inc. v. Farmers Ins. Exch.,
89 F.3d 233 (5th Cir. 1996) 14

United States v. E.I. du Pont de Nemours & Co.,
351 U.S. 377 (1956) 6, 9

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 6

Wilson v. Mobil Oil Corp.,
940 F. Supp. 944 (E.D. La. 1996) 13, 14

Statutes

Sherman Antitrust Act of 1890, Section 2 10
S. Ct. R. 10 ..... 8, 13

No. 96-981

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED FARMERS AGENTS ASSOCIATION, INC., et al.,
Petitioners,

v.

FARMERS INSURANCE EXCHANGE, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents ("Farmers") are five insurance companies selling various lines of insurance, including life, homeowners, automobile, and commercial liability. Farmers has approximately 14,000 independent contractor agents operating in twenty-nine states. Pursuant to contracts with the agents, Farmers is obligated to provide, without charge, policyholder information. At all times, Farmers has provided policyholder information to its agents by supplying company manuals and forms.

In 1981, Farmers created a dual system of policyholder information retrieval. Agents were encouraged, but not required, to access computerized records through a dumb terminal. This system has been generally referred to as the Farmers Agency Network System ("FANS"). Beginning in 1985, as computer systems became more technologically advanced, agents accessing FANS could also make changes in the database itself. Although policyholder information remained available in manual form, agents opting for computerized retrieval had to do so by using a specially - configured computer purchased or leased from Farmers.[1/] Despite the growth of services available via FANS, agents

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1/ As technology continued to advance, Farmers increased the number of options available to subscribing agents. Beginning in 1993, agents wishing to participate in computerized retrieval were able to do so through the purchase of compatible equipment from third parties.

have always had the ability to access the same information by telephone, fax, or mail without the necessity of computer linkage.[2/] Agents were encouraged by Farmers not to purchase computer equipment until the size of their business had grown sufficiently to make it economically efficient. Agents were encouraged to "cluster" and to share computer equipment by various means either with other agents or with district managers. As an incentive, Farmers offered a small per transaction payment to each agent who would electronically access FANS, whether the agent owned a computer or not.

In the fifteen years that the FANS program has been operating, only half of Farmers' 14,000 agents have leased or purchased systems. However, over ninety percent of the agents have achieved electronic access, either through purchasing or leasing a FANS computer system, or by some form of sharing.

Electronic access to Farmers' policyholder information is made available only to Farmers' agents and employees. It is not made available to third parties, and has never been sold or leased. Agents do not pay for access to policyholder information. Farmers is in the business of selling insurance to

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2/ FANS includes "off-line" services, including word processing, desk top publishing, and other marketing features. Thousands of agents have their own "off-line" computer systems, totally independent of FANS.

policyholders through its agents. It does not sell policyholder information, and does not sell computers or computer services except in support of its provision of services to insurance customers.

Petitioners agree that the insurance sales market is highly competitive, and that Farmers lacks market power in this market. Rather, they contend that Farmers' lack of market power in the market for insurance sales is "irrelevant." Petitioners contend that the Court of Appeals erred in failing to define a "market" consisting of "electronic access" to Farmers' policyholder information. In failing to find a market in which Farmers has a 100 percent share, Petitioners contend that the Court of Appeals failed or refused to follow *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) ("*Kodak*").

This Brief In Opposition will demonstrate that Petitioners are wrong. The Court of Appeals followed *Kodak*, and applied it correctly. The Court of Appeals correctly found that Petitioners failed to present any evidence that there was a "market" for electronic access, or that Farmers could have possessed or exercised market power. Petitioners thereby failed the threshold test of presenting evidence of "appreciable economic power" in the tying product market. *Kodak*, 504 U.S. at 462.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict With Any Decision Of This Court.

The Petition provides no basis for review by this Court. Petitioner does not suggest that there is a conflict among the Courts of Appeals concerning the issues resolved in this case. As will be discussed herein, the Courts of Appeals for the Second, Fifth, and Seventh Circuits have come to the same conclusion on substantially similar issues. Nor does the Petition present any important question of federal law for this Court to review, or call for an exercise of this Court's supervisory power over the proceedings of the lower courts. Since at least *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958), through *Kodak*, the Courts of Appeals and the District Courts have been relatively uniform in recognizing and applying the elements of a tying violation. Since at least this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) ("*Jefferson Parish*"), the courts have recognized that appreciable economic power in a properly defined tying market is an essential element.[3/]

Contrary to Petitioners' assertions, the decision of the Court of Appeals does not conflict with any decision of this Court. Clearly, it does not represent a repudiation or a refusal

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3/ In *Jefferson Parish*, the Court defined market power as "the ability of a single seller to raise price or restrict output." 466 U.S. at 14.

to apply the principles of *Kodak*. In performing its *de novo* review of the grant of summary judgment by the District Court, the Court of Appeals defined the relevant market consistent with decisions of this Court, including *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) ("*du Pont*"); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Jefferson Parish*, 466 U.S. 2; and *Kodak*, 504 U.S. 451. The Court of Appeals found that it was undisputed that Farmers lacked market power in the relevant market of insurance sales. The Court applied the cross-elasticity of demand for substitutes test as a determinant for the presence or absence of market power. From *du Pont* to *Kodak*, there is nothing unique or startling about this analysis, nor its citations of authority, including Professors Areeda, Turner, Baumol, and Blinder.[4/] It is a correct application of controlling law in defining markets.

Petitioners seem to argue that *Kodak* represents a repudiation of the principles of *Jefferson Parish*, and, by implication, of *du Pont*, and of a legion of antitrust commentators.[5/] This is misplaced. *See, e.g., Digital Equip.*

4/ *See, e.g.*, Court of Appeals decision at Footnote 3, reprinted in Appendix at A-4.

5/ Petitioners do not cite a single post-*Kodak* case that supports the proposition that *Kodak* has in any way modified the law relating to the market definition process.

Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 763 (7th Cir. 1996). The cases are in harmony, and not in conflict.

Petitioners' argument that *Kodak* has rewritten the law of tying and market definition is simply wrong. *Kodak* does not dispense with analyzing markets to determine the availability or lack thereof of substitutes which would, assuming a price increase, cause consumers to substitute away from the increase. Rather, it recognizes that summary judgment at an early stage in a complex antitrust case should not be granted where the plaintiff is able to articulate market imperfections that would demonstrate that substitutes are not, in fact, available, as a constraining influence on the ability of a defendant to price above competitive levels. This is particularly so where, with scant discovery, there was evidence in *Kodak* of pricing above competitive levels, and a showing of the ability to price discriminate against buyers who, because of previously incurred sunk costs, were unable or unlikely to be able to substitute away from the increase. Thus, rather than dispense with market analysis of substitutes, *Kodak* recognized that market realities would be preferred over underdeveloped economic theory.[6/]

In *Kodak*, the Court discussed market imperfections, and the inability to substitute away from price increases

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6/ Here, the market reality is that after two years of discovery, Petitioners could not present any market imperfection evidence to warrant a narrowing of the relevant market to a single brand.

because of high information or switching costs. On Farmers' facts, the Fifth Circuit applied the *Kodak* analysis and held that, even assuming a "market" for "electronic access," Petitioners had tendered no evidence of information or switching costs, and no evidence of price discrimination imposed upon any pre-1981 agents. As to agents who joined Farmers after 1981, the Court properly held that there were insignificant information costs. Manual access and "clustering" are good substitutes, so there were insignificant switching costs. Accordingly, the Court of Appeals decision is essentially factually driven, and is certainly not the result of a failure or refusal to apply the appropriate market definitional tests of this Court.[2/]

B. There Is No Conflict With Any Decision Of Another Circuit.

Petitioners do not argue that the Court of Appeals decision is in conflict with the decision of any other Circuit, and it is not. Accordingly, the within decision is inappropriate for review pursuant to Supreme Court Rule 10.

2/ As noted by the Court of Appeals, Petitioners' counsel could offer no justification for choosing "electronic access" as a "relevant market" other than that he was trying to define the market as narrowly as possible, in order to make it look as if Farmers had market power. Appendix at A-5.

All of the Courts of Appeals that have addressed similar issues have spoken with one voice in refusing to conclude that *Kodak* overruled *Jefferson Parish*, *du Pont*, and other leading precedents of this Court applying traditional market analyses to antitrust tying claims.

In *Lee v. Life Ins. Co. of North America*, 23 F.3d 14 (1st Cir.), *cert. denied*, 115 S. Ct. 427 (1994), three university students appealed a District Court dismissal of their federal tying claim and argued that, pursuant to *Kodak*, it was error for the District Court to find that their "information costs" allegations were insufficient. The Court rejected appellants' argument and held that they had exaggerated the reach of *Kodak*. The Court of Appeals held that information needed to evaluate matriculation at the University of Rhode Island ("URI"), which was conditioned on the "purchase" of health clinic services, was not shown to be beyond the reach of students wishing to attend the university. Citing Areeda and Hovenkamp, the Court noted that *Kodak* should be viewed in context, and applied only to situations where information is hard to obtain. Here, there is no evidence that there were any "information" costs of any significance.[8/]

8/ The District Court ruled further that the students had failed to state an actionable claim that they were "locked in," as they failed to plead actual costs that would be associated with switching from URI after their first semester. *Lee*, 23 F.3d at 19. Here, Plaintiffs also failed to allege any actual switching costs.

In *Digital Equip.*, the Court of Appeals for the Seventh Circuit affirmed the dismissal of an antitrust counterclaim, in which Uniq alleged the tie of the plaintiff's computer to an installed operating system.[2/] 73 F.3d 756. Judge Easterbrook held that Uniq's reliance on a single seller market was misplaced. Under Uniq's interpretation, *Kodak* would have overruled *Jefferson Parish*. The Court held that *Kodak* did not. *Digital Equip.*, 73 F.3d at 763. Uniq had not supplied any evidence that Digital was able to raise prices or exploit any customer by deciding to include an operating system with the computers. This is because Digital would not be able to exploit any customer "locked in" to its equipment. Existing customers would be unaffected, and potential customers would shop for substitutes.

In *DeJesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65 (2nd Cir.), *cert. denied*, U.S. LEXIS 7180 (U.S. 1996), the Court of Appeals for the Second Circuit affirmed the dismissal of a complaint without leave to amend, holding that access to an insurance company's database cannot, as a matter of law, be deemed a tying or tied "product." The Court held that the database is not generally available to persons willing to pay for it. Rather, it is a body of information that is made available to the insurance company's agents in connection with their

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2/ Uniq included a claim for relief for violation of Section 2 of the Sherman Act. This same claim was asserted in *Kodak*. There is no Section 2 claim in the within litigation.

employment. In affirming the District Court's dismissal of the complaint without leave to amend, the Court cited *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 892 F. Supp. 890, 902 (W.D. Tex. 1995), as follows:

> [E]lectronic access to the information contained in [a database maintained by an insurance company for its agents] is not a "product" capable of tying IBM computers
>
> . . . .

DeJesus, 87 F.3d at 71. The Court of Appeals for the Second Circuit then added: "Again, this tying claim fails at the threshold." *Id.*

Here, the Court of Appeals for the Fifth Circuit recognized that rather than constituting a "separate product," electronic access to policy information was merely a component of Farmers' insurance product, and had never been made available to anyone other than a Farmers' agent.[10/] As such, "This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under the antitrust laws." Appendix at A-5.

10/ This is consistent with the Court's holding in *Kodak* that for services and parts to be considered two distinct products, there must be sufficient consumer demand so that it would be efficient for a firm to offer them separately. 504 U.S. at 462.

It is not surprising that Petitioners, after two years of discovery pursuant to a scheduling order, have offered no evidence of high information or switching costs. There has always been intense competition in the market for insurance agents, which forced Farmers to pay competitive wages and precluded it from imposing above-market prices for services to agents. Manual access was a good substitute for electronic access, so this factor alone would seriously limit Farmers' ability to charge more than a market price for electronic access to the same information.[11/] Appendix at A-8.

There are no conflicts of decisions among the various circuits. Accordingly, review is inappropriate.

C. This Case Is In Any Event An Inappropriate Vehicle For Review.

A fair reading of the Court of Appeals decision compels the conclusion that it properly applied the principles of *Jefferson Parish* and *Kodak*. In fact, the Court of Appeals for the Fifth Circuit pointedly noted the distinction between *Kodak* and the present case, stating:

11/ Petitioners' theory has always been implausible as against Farmers' economic interest. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986).

> In sharp contrast to *Kodak*, in which the plaintiffs supported their claims of market power with evidence that Kodak charged above-market prices and engaged in price discrimination, the plaintiffs here simply allege that Farmers charged prices above the market price for computers without offering any evidence of what the market price for reliable computers was or alleging that the bundle of products, taken together, was sold at an above-market price.

Appendix at A-7.

Petitioners' quarrel seems to be with the finding by the Court that the Plaintiffs failed to raise a question of material fact as to whether Farmers could have market power within a "market" for electronic access to Farmers' policyholder information, even assuming that there could be such a "market." Thus, Petitioners' quarrel is not with the Fifth Circuit's application of *Kodak*, but with the alleged erroneous factual findings or the alleged misapplication of a properly stated rule of law. As set forth in Supreme Court Rule 10, a petition for writ of *certiorari* is rarely granted in either eventuality.

That the Court of Appeals for the Fifth Circuit evenhandedly applied the rules of *Kodak*, and rendered its decision in a factually-based manner, is articulated in *Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944 (E.D. La. 1996). There,

the Court denied a motion to dismiss and held that because of allegations of *Kodak*-type switching and information costs, the plaintiff should be allowed to prove that the relevant product market was the defendant's franchise system. In so holding, the District Judge stated that:

> The Court is also mindful of the Fifth Circuit's recent decision in *United Farmers Agents Association, Inc. v. Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996). There, the Court affirmed a summary judgment dismissing tying claims by insurance agents who asserted that five insurance companies had tied access to computerized policyholder information to the purchase of specially configured IBM computers . . . [I]t expressly addressed the issues of whether there was evidence of high information or switching costs to justify invocation of *Kodak*. Finding no such evidence, the Court affirmed summary judgment for the insurers.

Wilson, 940 F. Supp. at 952.

Because Petitioners' primary complaint is that the Court of Appeals made erroneous factual findings or misapplied a properly stated rule of law, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Dated: January 2, 1996

Respectfully submitted,

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